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Supreme Court, U.S.
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CASE NO. A 228

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH STEFAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

MAY A LEGALLY UNPROVEN THEORY BY BANK EXAMINERS THAT SEVERAL LOANS COULD BE CONSTRUED TO CONSTITUTE A VIOLATION OF A CIVIL BANKING REGULATORY STATUTE BE CONVERTED INTO PROOF OF THE INTENT TO VIOLATE A *CRIMINAL* STATUTE PROHIBITING THE MISAPPLICATION OF BANK FUNDS?

II.

IS A SINGLE DEFENSE REFERENCE TO THE ONE-SIDED EVIDENCE PRESENTED TO THE GRAND JURY, VIS-A-VIS THE PROOF AT TRIAL, IMPROPER SO AS TO RENDER AN IMPROPER PROSECUTORIAL REMARK, IMPLYING THAT INNOCENT PEOPLE ARE NOT PROSECUTED, NOT PREJUDICIAL?

III.

MAY THE "INVITED RESPONSE" DOCTRINE BE APPLIED WHEN THE "INVITING" REMARK WAS MADE BY COUNSEL FOR A CO-DEFENDANT FROM WHOM SEVERANCE HAD BEEN SOUGHT?

[continued]

IV.

MAY IT BE DETERMINATED THAT A RICO CHARGE, DISMISSED BY THE COURT, DID NOT TAINT THE REMAINING COUNTS MERELY BECAUSE THE JURY ACQUITTED ON SOME OF THE CHARGES?

PARTIES BELOW

The Court of Appeals issued a joint opinion deciding *United States of America v. Joseph Stefan* (No. 83-5590), and *United States of America v. Irvin Freedman* (No. 83-5687).

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The judgment of conviction in the United States District Court for the Southern District of Florida was unreported. The opinion of the United States Court of Appeals for the Eleventh Circuit was reported at 784 F.2d 1093. The order denying rehearing is not yet reported.

STATEMENT REGARDING JURISDICTION

The Court of Appeals for the Eleventh Circuit entered an order affirming Petitioner's conviction on March 20, 1986. Rehearing was denied on August 11, 1986, and, Petitioner having sought no stay of mandate, the Eleventh Circuit mandate issued on August 28, 1986. This Honorable Court, by Mr. Justice Powell, granted an extension of time in which to file this Petition on September 24, 1986.

This Court has jurisdiction to entertain this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTES AND PROVISIONS INVOLVED

This case involves the following provisions:

> Whoever, being an officer, director, agent or employee of . . . any . . . national bank . . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver,

shall be fined not more than $5,000 or imprisoned not more than five years, or both; . . . .

18 U.S.C. § 656.

The total obligations to any national banking association of any person, copartnership, association, or corporation shall at no time exceed 10 per centum of the amount of the capital stock of such association actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund. The term "obligations" shall mean the direct liability of the maker or acceptor of paper discounted with or sold to such association and the liability of the indorser, drawer, or guarantor who obtains a loan from or discounts paper with or sells paper under his guaranty to such association and shall include in the case of obligations of a copartnership or association the obligations of the several members thereof and shall include in the case of obligations of a corporation all obligations of all subsidiaries thereof in which such corporation owns or controls a majority interest. . . .

12 U.S.C. § 84, *in pari materia* with:

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be

determined and ajudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

12 U.S.C. § 93.

No person . . . shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

U.S. Const. Amend. V.

STATEMENT OF THE CASE

Petitioner, Joseph Stefan, was indicted by a federal grand jury sitting in Miami, Florida, in a 31-count indictment. All the allegations pertained to bank activities during his tenure as President and Chairman of Miami National Bank. Petitioner was ultimately convicted of five counts of misapplication of bank funds, a violation of 18 U.S.C. § 656. He was also convicted of two counts of wire fraud, two counts of making false statements, one count of mail fraud, one count of interstate transportation of stolen property, and one count of making a false statement in a bank report, all of which, the Eleventh Circuit noted, "emanated from" the misapplication charges. 784 F.2d at 1097.

Petitioner received only concurrent sentences of five years probation and 1,000 hours of community service. No stay of execution of this sentence was ever sought, and the community service was completed in 1984.

In 1975, Citibank controlled Miami National Bank, 80% of the stock of which had been pledged to Citibank as collateral on a loan. At that time, Miami National Bank had serious financial problems. To remedy the situation, the Deputy Comptroller of the Currency recommended that Citibank hire Petitioner, who had a long and illustrious career in banking and an impeccable background, to head Miami National Bank. Citibank did so. Under Petitioner's guidance, Miami National Bank prospered and Citibank suffered no loss when it sold the bank.

This case developed, however, from a dispute between Petitioner and bank examiners regarding the propriety of certain loans. All of the charges emanated from loans made by Miami National Bank which bank examiners asserted were made to a development project known as "The Outrigger." This project was originally owned by a corporation, a stockholder in which had been Irvin Freedman (the co-appellant in the Eleventh Circuit, who was convicted of numerous charges similar to, but exceeding in number, those of which Petitioner was convicted, plus RICO conspiracy).

In 1976, Kenneth Wilpon, a long-term client of Citibank as a major New York area developer, was recommended to Miami National Bank. Wilpon took over 100% of the voting stock in three corporations which separately controlled the residential, commercial and recreational aspects of the Outrigger project. Miami National Bank, dealing with Wilpon (not Freedman), became the lead lender on the project, making loans to two of the three Outrigger corporations. These loans each came within the mandate of 12 U.S.C. § 84, a civil regulatory statute which provides that a national bank may only lend 10% of its capital to any one borrower.[1] Neither bank counsel nor the Board of Directors believed those loans to be Section 84 violations. Section 84 is not a criminal statute, but provides a civil restitutionary remedy, providing that bank directors are personally liable to the bank's stockholders for losses incurred as a result of a violation of the bank's lending limits. *See* 12 U.S.C. § 93. The bank incurred no losses on these loans.

[1]The bank's lending limit was $575,000. The largest loan was $575,000.

Petitioner's conviction was unrelated to these direct Outrigger loans. Rather, he was convicted of misapplication of bank funds, and the charges emanating therefrom, based upon loans made to other entities. None of these loans exceeded the Section 84 lending limit of Miami National Bank.

All of the charged loan transactions fell into three categories. First, there were loans which were routine banking transactions in which Petitioner, and his directors' loan committee which independently approved all loans, exercised reasoned judgment as experienced bankers to determine the likelihood of collectibility after reviewing the collateral and assets and the reputations of the personal guarantors of the loans. These loans were each separately and adequately collateralized.[2] Second, there were loans in which subordinates of Petitioner improperly misused their properly-delegated authority in making loans. Third, there were loans by which the bank was unknowingly victimized by fraudulent or forged representations presented by those seeking the loans. As to the latter two categories of loans, the evidence showed that in each instance

[2]Petitioner is aware that the Eleventh Circuit opinion comments that Petitioner knew that loans were made to sham borrowers. A fair review of the evidence, however, would have shown that upon the loan application and documentation provided to the loan committee and Petitioner, each loan was fully collateralized and every borrower appeared to be able to repay the loan and intended to do so. This should not have been sufficient to support these convictions, especially since the exculpatory testimony came from government witnesses. *See United States v. Gallagher*, 576 F.2d 1028 (3d Cir. 1978); *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974). Petitioner's detailed (with Record citations), 80-plus point Motion to Strike the government's brief because of factual misstatements was never ruled upon by the Eleventh Circuit.

Freedman, as an unrevealed behind-the-scenes actor, although not an authorized signatory to any loan application, conspired with other individuals to improperly obtain approval for the loans from Petitioner and the Board of Directors.[3]

The government contended, however, that Petitioner knowingly made loans to straw borrowers. To prove this contention—which it needed to sustain its case, as no other real evidence of misapplication was provided—the government relied in large part upon the conclusion by some bank examiners that these loans violated the lending limit of Section 84.

Importantly, that these loans could, in fact, be cumulated to create a violation of Section 84 was *never* established to be legally supportable, but rather was testified to by bank examiners as a foregone conclusion. Petitioner always believed that the loans were proper under Section 84, an opinion based in part on an advisory opinion the bank received from the Regional Attorney for the United States Office of the Comptroller. The Regional Attorney stated that as long as made to separate corporations with independent sources of repayment, the loans would not be cumulated under Section 84. This was a correct ruling. The examiners believed that the existence of separate sources of repayment was not relevant and erroneously looked only to whether the borrowing corporations, although legally separate, all were connected to the same development project.

[3]For example, the evidence indicated that Petitioner's chief lending officer, who was a principal government witness, accepted bribes in connection with some of the loans without Petitioner's knowledge.

Over objection the government was allowed to continually refer to the accusations that the loans by Miami National Bank were made, in fact, to borrowers which the government asserted constituted a single entity for purposes of the civil regulatory statute, 12 U.S.C. 84. Further, the jury was instructed that although violations of Section 84 should not be considered violations of the criminal law, it could consider evidence of violations of Section 84 in determining whether or not Petitioner had the required intent to misapply bank funds under 18 U.S.C. § 656. The jury was never instructed that it had to find that Section 84 had in fact been violated in order to so infer intent.

Thus, the jury was permitted to infer criminal intent from a bank examiner's conclusions—never properly proven in a court of law—that certain loans were all Outrigger loans, and from that jump to a conclusion that Petitioner knowingly made loans to straw borrowers. Despite the fact that the evidence was "not overwhelming," as noted by the Eleventh Circuit, 784 F.2d at 1097, this creation of criminal intent[4] from a bank examiner's allegations was held proper.

Also relevant to this Petition is a RICO conspiracy charge levelled against Petitioner. In that indictment count, Petitioner was accused of engaging in a racketeering conspiracy with Freedman, who was convicted of that charge. In opening argument the prosecutor characterized Petitioner as a racketeer, and

[4]The trial court noted, in sentencing Petitioner to only probation, that he had absolutely no criminal intent in the true sense of the word, and had not gained personally from the Outrigger transactions. In fact, it was the bank which so gained.

the evidence was presented with that allegation in the minds of the members of the jury. Although the District Court acquitted Petitioner of that charge, Petitioner's name was left in the RICO conspiracy count of the indictment which was given to the jury. Petitioner objected and unsuccessfully requested an instruction clarifying that Petitioner was not part of the RICO conspiracy.

Further, the prosecutor argued in closing argument, referring to the allegation of a scheme to defraud, that:

> "The manner and means of carrying out the scheme and artifice to defraud are similar to the manner and means of carrying out the conspiracy. . . ."

Finally the Court instructed the jury that it should:

> "Examine [the allegations of the RICO count] to ascertain or determine whether a scheme or artifice to defraud existed, although, as to the defendant [Petitioner], in doing so, the reference should not be in the context of the conspiracy charged in [the RICO count]."

Despite this instruction, during deliberations the jury queried the court whether or not "the belief there was a conspiracy should govern in deciding subsequent counts."

The Eleventh Circuit held that since the jury acquitted on some counts, it must have "meticulously

sifted the evidence," and Petitioner's conviction was therefore not tainted by the initial allegation that he was a racketeer.[5]

This case also presented an issue of prosecutorial misconduct. In the rebuttal portion of closing argument, the prosecution argued:

> There is an accusation, by implication at least, that this case is a fabrication. South Florida is a big area. There is a lot of crime in South Florida. Is it reasonable to think that the government would fabricate a case just to go to trial with all of the crimes in this area?

Petitioner immediately objected and moved for a mistrial.

On appeal, the government argued that this argument had been invited by a remark by a co-defendant's[6] counsel, made over objection. The supposedly "inviting" remark was a comment upon the process by which a defendant is indicted, as follows:

> What does a grand jury hear?
>
> Because you are going to see, as you have already, those hideous and horrendous words, "The grand jury charges."

* * *

[5]Of course, this "meticulous sifting" also resulted in guilty verdicts on three counts as to which the District Court later entered judgments of acquittal.

[6]Petitioner had moved for severance from this co-defendant.

I wonder if what the grand jury heard, when they returned this indictment, is what they heard [the prosecutor] tell you in his closing statement.

* * *

There is no jury there. There are no lawyers there, except the prosecution. Then they come out with this piece of paper and say, "The grand jury charges."

* * *

It's easy — well, I won't say it's easy, but hearing one side and only the prosecution side of this matter makes it rather simple, I assume, to have an indictment spelled out and to say, "The grand jury charges."

That's the reason, if you please, why His Honor, Judge Aronovitz, will tell you that the indictment is not evidence of anything . . . .

Petitioner contended, however, that the "inviting" remark was proper, and in weighing the prejudice flowing from prosecutorial misconduct the invited response doctrine was inapplicable. On rehearing, Petitioner further pointed out that the remark was made by counsel for a co-defendant from whom Petitioner had sought severance, and so the invited response rationale should not be adhered to.

Nonetheless, the United States Court of Appeals for the Eleventh Circuit affirmed Petitioner's convictions in all respects. Rehearing and rehearing en banc were also denied.

ARGUMENT

I. A LEGALLY UNPROVEN THEORY BY BANK EXAMINERS THAT SEVERAL LOANS COULD BE COMBINED TO CONSTITUTE A VIOLATION OF A CIVIL BANKING REGULATORY STATUTE MAY NOT BE CONVERTED INTO PROOF OF THE INTENT TO VIOLATE A *CRIMINAL* STATUTE PROHIBITING THE MISAPPLICATION OF BANK FUNDS.

There are increasing numbers of prosecutions being brought pursuant to 18 U.S.C. § 656 for the misapplication of bank funds. Courts have held that violation of this criminal statute may be demonstrated by relaxed proof of *mens rea*: knowledge inferred from a mere reckless disregard of the bank's interests. *See United States v. Adamson*, 700 F.2d 953 (11th Cir. Unit B 1983) (en banc), and cases cited therein. This Court must, therefore, provide guidance for the lower courts regarding what kind of proof can be used to demonstrate a reckless disregard of a bank's interest: specifically whether evidence of civil regulatory violations—not properly proven—may be used.

As long ago as 1909, it was established that a jury cannot be permitted to infer an intent to injure a bank, and therefore criminal misapplication, from the violation

of the predecessor statute to Section 84. *United States v. Steinman*, 172 Fed. 913 (3d Cir. 1909) (citing *United States v. Britton*, 107 U.S. 655, 2 S. Ct. 512, 27 L.Ed. 520 (1882)). Thus, as recently as 1980, the Fifth Circuit held that civil regulatory violations are "legally irrelevant" in a criminal prosecution for misapplication. *United States v. Christo*, 614 F.2d 486, 492 (5th Cir. 1980).

The *Christo* case is illustrative of the rationale for the exclusion of civil regulatory statute violations. In that case, the issue was the propriety of basing criminal intent upon a statute (12 U.S.C. § 375a) which set a limit on the amount of credit a bank may extend to its officers. Noting that "no one disputes that a civil violation of 12 U.S.C. § 375a may have occurred,"[7] 614 F.2d at 486, the Fifth Circuit nonetheless reversed Christo's conviction. The Court pointed out that:

> The government's evidence and argument concerning violations of § 375a impermissibly infected the very purpose for which the trial was being conducted—to determine whether Christo willfully misapplied bank funds with an intent to injure and defraud the bank, not whether Christo violated a regulatory statute prohibiting the bank from extending him credit in excess of $5,000. The trial court's instructions and emphasis on § 375a served only to compound the error by improperly focusing the jury's attention to the prohibitions of § 375a.

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[7]Here, Petitioner disagreed that a violation of Section 84 occurred. No violation was ever determined to have existed by the finders of fact below.

Id. at 492. Thus, the Court held that upon retrial:

> The government will have to present the requisite facts amounting to criminal misapplication, in the same manner as the hundreds of cases previously tried in our federal courts, and its case against Christo will have to stand on its own hind legs unaided by any prejudicial reference to violations of § 375a.

Id. (footnote omitted).

The rule against the admission of evidence of the violation of regulatory statutes is merely the manifestation of the rule that " 'crimes are not to be created by inference' from the combination of civil statutes and government disapproval." *United States v. Frade*, 709 F.2d 1387, 1392 (11th Cir. 1983) (quoting *United States v. Laub*, 385 U.S. 475, 487, 87 S. Ct. 574, 581, 17 L.Ed.2d 526, 534 (1967)). In attempting to prove criminal misapplication of bank funds, the government must not be allowed to create a crime from a statute not intended to establish criminal liability. Section 84 has always been recognized to be remedial and "not . . . a penal statute intended to punish a wrong-doer for a wrongful act . . . ." *Stephens v. Overstolz*, 43 Fed. 465, 465 (E.D. Mo. 1890); *accord*, *Orth v. Melhouse*, 36 F.2d 367 (D. Minn. 1929). Congress was at liberty to make violation of a lending limit statute a crime, but this it failed to do:

> That the applicable portion of [Section 84] is remedial and provides only for a civil remedy is not open to successful contradiction. The

import of the language itself used, is, it is believed, sufficient to indicate that Congress did not have in mind the assessment of a penalty in the premises. It is simply a statutory enactment of a common-law liability to recover civil damages for the amount of the loss and very likely for any additional damages flowing therefrom.

United States v. Brown, 6 F. Supp. 331, 332 (W.D. Ky. 1933) (citations omitted). Absent an express congressional establishment of criminality based on a violation of a lending limit regulation, the courts cannot create one by allowing such a violation to be used to establish criminal intent.[8]

In this case, the Eleventh Circuit attempted to distinguish *Christo* by interpreting it as holding that criminal misapplication may not be premised only on proof of a civil regulatory violation. Such a distinction may not be properly made. In *Christo*, the evil was using a civil violation to prove criminal intent. Instructing the jury that it may consider civil violations on the issue of intent is no different; the jury verdict may under such instruction nonetheless be based solely on the civil violation. Thus, there is a direct contradiction of *Christo's* holding that the civil violation evidence was inadmissible.

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[8]Indeed, the Eleventh Circuit has not been alone in impermissibly creating a crime from a lending limit violation. *See United States v. Clark*, 765 F.2d 297 (2d Cir. 1985) (violation of bank-given authority to lend $75,000 to any one borrower); *United States v. Mohr*, 728 F.2d 1132 (8th Cir.), *cert. denied*, ____ U.S. ____, 105 S. Ct. 148, 83 L.Ed.2d 87 (1984) (state lending limit violated).

In this case, however, the only way in which the government could hope to substantiate its allegation of criminal intent was by the improper proof of alleged Section 84 violations. The trial court compounded this error by instructing the jury that Section 84 violations could be used to infer criminal intent (which incorrectly presupposed that the Section 84 violations had been properly proven), even though the District Court itself indicated that Petitioner did not have criminal intent in the traditional sense. Had the trial court not erroneously believed that Section 84 evidence was proper to prove intent, this case would not now be before this Court.

Further, even assuming *arguendo* that evidence of civil regulatory violations may be admitted, the government should be required to prove, and the jury to find, that such violations did, in fact, occur before it may be used to infer intent. Here, the government did not independently prove this fact. Rather, it relied upon the conclusions found in the testimony of a bank examiner. The District Court did not require the jury to first determine whether the various loans made by Miami National Bank were made to the same person (Wilpon), and then utilize that determination in reviewing the existence of criminal intent. This was error, and deprived Petitioner of his Due Process rights. Absent that prior determination, criminal misapplication could not be established beyond a reasonable doubt.

This issue is of profound importance. Bank officers now stand subject to criminal liability for acts which, as here, they and their Board of Directors in good faith believed to be not in violation of a civil statute because there was a valid conflict of opinion as to the statute's application. This result cannot constitutionally stand.

II. A SINGLE REFERENCE TO THE ONE-SIDED NATURE OF THE EVIDENCE PRESENTED TO A GRAND JURY, VIS-A-VIS THE PROOF AT TRIAL, IS NOT IMPROPER SO AS TO INVITE A PROSECUTORIAL REMARK IMPLYING THAT ONLY THE INNOCENT ARE PROSECUTED.

In *United States v. Young*, ____ U.S. ____, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985), this Court discussed the "invited response" doctrine in a case in which counsel for the defendant had not objected to the remarks and had clearly provoked them by *repeated* attacks on the prosecution, and in which the overwhelming evidence negated the existence of prejudice. This case presents this Court with an opportunity to review the applicability of the doctrine when the prosecution's remark was *clearly* improper and unethical, the defendant both objected and moved for a mistrial, the "inviting" remark was not a personal attack on the prosecution, the "invitation," if such, was isolated, and the evidence was *not* overwhelming.[9]

In *Young*, this Court reviewed the listed factors and determined that, taken in context:

> The prosecutor's statements, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice.

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[9]Further, the "inviting" remark was made by counsel for a co-defendant. See Argument Point III, *infra*.

Id. at ____, 105 S. Ct. at 1047, 84 L.Ed.2d at 13.

The facts of this case are vastly different and should be reviewed, and legal standards set forth under them, because a miscarriage of justice *has* occurred.

Petitioner was convicted upon not only improper but, as the Eleventh Circuit noted, less than overwhelming evidence. In *Young*, it was noted that the "overwhelming evidence" against Young:

> eliminate[d] any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations or exploited the Government's prestige in the eyes of the jury.

Id. at ____, 105 S. Ct. at 1049, 84 L.Ed.2d at 15.

Here, the improper remark that the government would not fabricate a case in crime-ridden South Florida may well have influenced the jury to stretch its collective imagination in order to convict Petitioner. There is here more than a "lingering doubt" that the prosecutor's remark may have convinced the jury that it was derelict in its duty if it failed to convict Petitioner of at least a few indictment charges.[10]

Additionally, the remark by a co-defendant's counsel did not, as the prosecution stated, imply that this case should not have been prosecuted. It merely cautioned

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[10]This can be seen to be particularly true in view of the fact that this was a three month trial involving highly technical banking evidence and procedures which were difficult for counsel to completely fathom, much less a jury.

the jury that an indictment is not proof of guilt and is based on only one side of the evidence. This is not improper argument which can properly be said to trigger an egregiously-improper statement like that made here.

The "invited response" doctrine is based on the premise that defense counsel's argument has provoked the prosecutor to reply "in kind." *See Young, id.* at ____, 105 S. Ct. at 1044, 84 L.Ed.2d at 9.

> It is a misapplication of this rule, however, to uphold an illegal argument under the guise of "reply in kind," where the initial argument, to which the purported reply is addressed, is itself a legally permissible comment to the jury.

Ex parte Rutledge, 482 So. 2d 1262, 1264 (Ala. 1984). The prosecutor's remark was not a reply to an equally improper remark. Defense counsel is permitted to comment on the law in order to place the prosecution, and the jury's function, in context. The purported invitation was merely an explanation of the forthcoming jury charge that an indictment is not evidence. Counsel could properly argue in closing about these principles which would later be incorporated in a jury charge. *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983).

Further, even assuming *arguendo* that the "inviting" remark was improper, the prosecutor *exceeded* the invitation. At most, co-defendant's counsel's remarks opened the door to a rebuttal argument confined to a review of why a grand jury proceeding is necessarily more one-sided than a trial.

The statement that inferred that only the guilty are prosecuted assumed the ultimate issue to be decided and was therefore well beyond any supposed invitation. This completely violated the established limitation on the concept of "invited response" that a prosecutor can only reply "in kind" to the invitation. A prosecutor still has a continuing duty to tailor his behavior to the situation at hand:

> [W]e have long emphasized that a representative of the United States Government is held to a *higher* standard of behavior:
>
> > "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a a case, but that justice shall be done . . . .
> >
> > ". . . Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.Ed. 1314 (1935).

Young, ____ U.S. at ____, 105 S. Ct. at 1052, 84 L.Ed.2d at 19 (Brennan, Marshall and Blackmun, JJ., concurring in part and dissenting in part); *see id.* at ____, 105 S. Ct. 1058, 84 S. Ct. at 26 (Stevens, J., dissenting).

Here, unlike in *Young*, the remarks of the prosecutor clearly undermined the fairness of the trial, and this Court should use this case to refine the holding in *Young* to its facts.

III. THE "INVITED RESPONSE" DOCTRINE MAY NOT BE APPLIED TO REDUCE A FINDING OF PREJUDICE WHEN THE "INVITING" REMARK WAS MADE BY COUNSEL FOR A CO-DEFENDANT FROM WHOM SEVERANCE HAD BEEN SOUGHT.

Petitioner contends that it was manifestly error and a denial of his right to a fundamentally fair trial to penalize him by an application of the "invited response" doctrine, when the invitation, if such, was made by counsel for a co-defendant. Petitioner unsuccessfully sought severance from that co-defendant, and because of that fact the Eleventh Circuit erred in holding that prejudice had been mitigated because of the jury's understanding that the remark was invited.[11]

Surprisingly, there is a paucity of case law discussing the question of whether a co-defendant's counsel may invite a response to the prejudice of another defendant. Perhaps this is due to the fact that the answer to this question should be clearly in the negative:

> It appears basically unfair and prejudicial to allow the prosecutor to inject improper material

[11]Petitioner realizes that he was tardy in only raising this issue on his petition for rehearing. However, the Court of Appeals could and should have considered the issue even without it being raised, and thus the issue is viable in this Court.

> into the case "to fight fire with fire" when it is also being used against a co-defendant who had no part in starting the blaze.

State v. Woodward, 21 Ariz. App. 133, ____, 516 P.2d 589, 591 (1973). The courts do, however, proceed with an assumption that the invitation must be made by the complaining defendant's counsel for the "invited response" doctrine to apply. *See United States v. Lee*, 743 F.2d 1240, 1254-55 (8th Cir. 1984).

Thus, the invited response rationale should never have been applied in this case. Since the evidence against Petitioner was not strong, it cannot be concluded that he was not prejudiced by the prosecutor's improper remark. Therefore, the Eleventh Circuit Court of Appeals' decision must be reversed.

IV. IT MAY NOT BE DETERMINED THAT A RICO CHARGE, DISMISSED BY THE COURT, DID NOT TAINT THE REMAINING COUNTS MERELY BECAUSE THE JURY ACQUITTED ON SOME OF THE CHARGES.

Courts have cautioned against "undue prosecutorial zeal in invoking RICO." *E.g., United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927, 100 S. Ct. 1312, 63 L.Ed.2d 758 (1980). Prosecutors have been admonished to utilize care in invoking RICO, in view of its purpose to combat organized crime, *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), and the courts have agreed that when a RICO count is not sustained, there is a risk of unfair prejudice requiring reversal because a jury is inflamed by the labelling of a defendant

as a "racketeer." *E.g., United States v. Guiliano*, 644 F.2d 85 (2d Cir. 1981). In the Southern District of Florida, particularly, this risk is extremely high due to the inclusion of a RICO count in a large percentage of indictments.[12]

The courts have *not* agreed, however, as to the standards to be applied in determining whether or not convictions on other counts following an acquittal of RICO charges have been tainted by the RICO charge. In this case, the Eleventh Circuit concluded that no taint could have occurred because the jury acquitted on some counts after the District Court had entered a judgment of acquittal on the RICO count. The Eleventh Circuit thus concluded that the jury must have "meticulously sifted the evidence," 784 F.2d at 1101, so no spillover of RICO evidence could have prejudiced Petitioner.

The rule is quite different in the Second Circuit. Rather than assuming that no taint occurred because of RICO charges, in that circuit, a RICO allegation is assumed to have affected the jury in such a way that it was influenced to improperly convict on other counts. *United States v. Guiliano, supra; United States v. Sam Goody, Inc.*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 673 F.2d 17 (2d Cir. 1982). The Second Circuit rule presumes that a jury might have reached a different verdict but for the allegations that a defendant is a racketeer, an approach Petitioner asserts is correct in view of the constitutional presumption of innocence.

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[12]This has evolved primarily from drug cases. An example is *United States v. Kabbaby*, 672 F.2d 857 (11th Cir. 1982).

Where, as here, the evidence of guilt on the charges of which a defendant is found guilty is not overwhelming, prejudice from RICO allegations cannot and should not be discounted by the mere fact that acquittals were entered on some charges. It is just as likely, if not more likely, that a jury would be influenced to find guilt on other charges when a defendant has been depicted throughout trial as a "racketeer," a "term having a decidedly pejorative connotation." *United States v. Ivic, supra,* 700 F.2d at 65. This likelihood is even greater where, as here, the RICO acquittal is entered by the District Court, because the jury is aware of the pejorative label without further having reviewed the evidence against a defendant after being instructed as to what, by statute, makes the label appropriate.

This case presents a compelling circumstance in which to review this issue. Not only was Petitioner charged in a RICO count that was not even submitted to the jury, in addition the taint was exacerbated by the jury instruction which required the jury to look back to the RICO count in the context of other charged crimes. The RICO taint was evident, and to assume that an acquittal on some counts indicates Petitioner was not prejudiced totally fails to consider the likelihood that the taint encouraged convictions on some counts. This deprived Petitioner of a fair trial.

CONCLUSION

For the foregoing reasons, Petitioner submits that this case is an ideal one in which this Court can resolve the important issues presented. The Eleventh Circuit Court of Appeals has been inundated by criminal appeals from massive drug cases, and has as a result become desensitized to the disastrous effect of a criminal conviction upon an individual with an impeccable background, like Petitioner, who had no criminal specific intent yet was convicted upon doubtful evidence and despite clear error. Justice can only prevail if this Court painstakingly reviews the errors below upon review of circuit court decisions.

Therefore, Petitioner urges this Court to issue a Writ of Certiorari and resolve the issues presented in this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that 3 copies of the foregoing were mailed this 10th day of November, 1986, to the Office of the United States Solicitor General, Department of Justice, Room 5614, 10th and Constitution Avenues N.W., Washington, D.C. 20530.

By ______________________
Lewis Bernstein

By Lorraine C. Holmes
Lorraine C. Holmes

Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph STEFAN, Irvin Freedman,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Irvin FREEDMAN,
Defendant-Appellant.

Nos. 83-5590, 83-5687.

United States Court of Appeals,
Eleventh Circuit.

March 20, 1986.

Appeals from the United States District Court for the Southern District of Florida

Before HATCHETT and CLARK, Circuit Judges, and ALLGOOD*, Senior District Judge.

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* Hon. Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

CORRECTED OPINION

HATCHETT, Circuit Judge:

In this case the appellants seek reversal of criminal convictions for numerous criminal offenses, including misapplication of bank funds, wire fraud, mail fraud, interstate transportation of stolen property, and racketeering. We affirm.

FACTS

This case began with an indictment charging Joseph Stefan and Irvin Freedman, the appellants, with a scheme to defraud Miami National Bank (MNB), of over $4.5 million in connection with a construction project operated by the Outrigger Club, Inc. Stefan was president of the bank. Freedman originally owned the Outrigger, but transferred 50 percent of his interest in the corporation to Kenneth Wilpon, a real estate investor from New York, in exchange for Wilpon's commitment to obtain refinancing for completion of the Outrigger project. Separate corporate entities were established to develop each phase of the Outrigger project: 13499 Corporation was established to develop the residential section; Biscayne South, Inc. was formed to control the commercial properties of the Outrigger; and Harbor Edge Yacht and Tennis Club, Inc. was formed to develop the marina section.

Freedman and Wilpon were successful in obtaining $4.5 million in loans from MNB for the Outrigger project. Loans were made directly to Freedman and Wilpon, to the three newly-formed Outrigger corporations which Freedman and Wilpon controlled, to several other

companies controlled by Freedman and Wilpon (including subcontractors on the Outrigger project), and to straw borrowers.

Title 12 U.S.C. § 84 prohibits a national bank from lending more than 10 percent of its capital in surplus account to any one borrower or group of related borrowers. MNB's legal lending limit was $580,000. Despite this limitation, Stefan either approved or obtained approval for over $4.5 million in loans for the Outrigger project.

After a three-month trial, the district court acquitted Stefan of a RICO conspiracy charge before sending the case to the jury. The jury subsequently convicted Stefan of five counts of misapplication of bank funds, two counts of wire fraud, two counts of making false statements to a federal bank examiner, one count of mail fraud, one count of interstate transportation of stolen property, and one count of filing a false bank report. Stefan received concurrent sentences of five years probation and 1,000 hours of community service on each count. The jury convicted Freedman on the RICO conspiracy count, nine counts of misapplication of bank funds, two counts of wire fraud, one count of interstate transportation of stolen property, two counts of bankruptcy fraud, and two counts of making false statements on his income tax returns. Freedman received concurrent sentences in the aggregate of seven years.

The issues we resolve regard sufficiency of the evidence, admission of evidence, prosecutorial misconduct, indictment sufficiency, and transcript deficiencies.

SUFFICIENCY OF THE EVIDENCE

Stefan contends that the evidence adduced at trial is insufficient to support his convictions. Freedman adopts Stefan's argument on the misapplication of bank funds charges and contends that he cannot be convicted of aiding and abetting misapplication of bank funds because the evidence is insufficient to support Stefan's convictions.

In reviewing challenges to sufficiency of the evidence, we must view the evidence in the light most favorable to the government and affirm the convictions if a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. *Glasser v. United States*, 315 U.S. 60, 79, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942); *United States v. Cruz*, 765 F.2d 1020, 1025 (11th Cir.1985). It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

Under this standard, we find the evidence sufficient to support Stefan's convictions on all counts. The jury convicted Stefan of five counts of misapplication of bank funds under 18 U.S.C. § 656 which prohibits bank officers from "willfully misapplying" bank funds. In order to convict under this statute, the government must prove that the accused knowingly participated in a deceptive or fraudulent transaction. *United States v. Adamson*, 700 F.2d 953 (5th Cir. Unit B 1983). The required intent, i.e., knowledge, may be inferred "from the defendant's reckless disregard of the interest of

the bank . . ." *United States v. Adamson*, 700 F.2d at 965.

Stefan contends that he lacked the requisite criminal intent and that a reckless disregard of a bank's interest cannot be inferred from his actions which amounted only to "bad judgment calls."

The jury, however, had before it evidence that: (1) Stefan knew that all of the borrowers to whom he made loans were bad credit risks; (2) Stefan knew that all of the loans were for the financially troubled Outrigger project; (3) Stefan did not look to several of the Outrigger borrowers to repay their loans; and (4) Stefan tried to conceal the extent of his Outrigger related transactions.

Although the evidence was not overwhelming, a rational jury could conclude beyond a reasonable doubt that Stefan misapplied Miami National Bank funds by acting in reckless disregard of the bank's interests. Stefan's convictions for wire fraud, making false statements to a federal bank examiner, mail fraud, interstate transportation of stolen property, and filing false bank reports all emanated from his misapplication convictions. Ample evidence exists to support the jury's guilty verdicts on all of the other counts as well.

Since we find the evidence sufficient to support Stefan's convictions, Freedman's argument that he cannot be convicted of aiding and abetting because the proof failed to establish that Stefan misapplied bank funds, must fail. Freedman also argues "that the evidence presented at trial did not sufficiently establish [that he had] knowledge of the alleged illegal acts of bank personnel nor his desire to participate therein."

The jury had before it evidence that Freeman arranged straw borrowers, prepared loan applications, and discussed financing for the debt-ridden Outrigger project with MNB bank officials. A reasonable jury could have found from the evidence that Freedman knowingly aided and abetted the misapplication of MNB funds. We therefore affirm Freedman's convictions for violating 18 U.S.C. § 656 as an aider and abettor.

EVIDENCE AND INSTRUCTIONS REGARDING VIOLATIONS OF 12 U.S.C. § 84

Stefan and Freedman next contend that the district court erred in allowing the introduction of evidence concerning infractions of 12 U.S.C. § 84, a civil regulatory banking statute, and by instructing the jury that it could infer criminal intent from infractions of that statute.

The district court allowed the government to introduce testimony concerning infractions of 12 U.S.C. § 84; it allowed the introduction of charts designed to show how the Outrigger related loans contravened the statute; and it allowed reference to section 84 violations in opening and closing statements. The court's instructions also focused the jury's attention on section 84.

Stefan and Freedman rely on *United States v. Christo*, 614 F.2d 486 (5th Cir. 1980), for the proposition that evidence of a violation of a civil regulatory statute is irrelevant and prejudicial in a criminal case based upon misapplication of bank funds. In *Christo*, the government contended that the defendants' violation of 12 U.S.C. § 375a, a civil regulatory banking statute limiting the amount that a national bank may lend its executive

officers, also constituted violations of 18 U.S.C. § 656, the criminal misapplication statute. The *Christo* court reversed the convictions, holding that the instructions as well as the "whole tenor of the trial" constituted plain error. The court stated: "A conviction, resulting from the government's attempt to bootstrap a series of checking account overdrafts, a civil regulatory violation, into an equal amount of misapplication felonies, cannot be allowed to stand." *Christo*, 614 F.2d at 492. The court also stated that "[a]fter examining the record of the trial, one questions whether Christo was found guilty of willful misapplication with intent to injure and defraud the bank or . . . for overdrafting his checking account." *Christo*, 614 F.2d at 492.

For the reasons set forth below, we disagree with Stefan and Freedman's conclusion that *Christo* compels a reversal of their convictions.

1. Evidence Regarding Section 84 Violations

Christo forbids introducing evidence of civil banking statute violations solely for the purpose of proving criminal misapplication; however, it does not hold that such evidence can never be introduced in a criminal misapplication case. In other words, it is not always error to allow evidence of civil banking statute violations in a criminal misapplication trial. If the evidence of civil violations is introduced for purposes other than to show criminal misapplication and the evidence is not presented in such a way that the jury's attention is focused on the civil violations rather than the criminal ones, there is no error.

In *Christo*, the government's theory of prosecution was that the appellants' violations of 12 U.S.C. § 375a, a civil statute, also constituted violations of section 656, the criminal misapplication statute. The court stated: "The government's evidence and argument concerning violations of 375a impermissibly infected the very purpose for which the trial was being conducted — to determine whether Christo willfully misapplied bank funds with an intent to injure and defraud the bank, not whether Christo violated a regulatory statute . . . ." *Christo*, 614 F.2d at 492.

In this case, the government did not base its prosecution for misapplication of bank funds on Stefan's alleged violations of civil statute 12 U.S.C. § 84. Rather, the government sought to show that Stefan violated the misapplication statute by making loans to straw borrowers for the Outrigger project knowing that the borrowers lacked the capacity to repay the loans. Evidence of civil violations was introduced, but not to show that such violations proved criminal misapplication.

The government argues that it would have been difficult, if not impossible, for the jury to get a proper understanding of the case without reference to section 84. The government sought to show that one reason Stefan dealt with straw borrowers was to avoid the limitation of section 84. The record indicates that Stefan was concerned about possible section 84 infractions and that he discussed the statute with other MNB officials and bank examiners. Pertinent evidence would be lost in this and other cases if we imposed a blanket prohibition against proof relating to infractions of civil banking statutes in criminal misapplication cases.

Christo does not compel such a result. The government's evidence and argument concerning infractions of section 84 did not "impermissibly infect the purpose for which the trial was being conducted." We hold that the district court did not err in allowing introduction of evidence concerning section 84 infractions.

2. Instructions Regarding Section 84 Violations

Again relying on *Christo*, appellants contend that the district court erred in instructing the jury that it could consider infractions of section 84 in evaluating intent to misapply funds under 18 U.S.C. § 656.

The district court in *Christo*, after dwelling on the government's theory of prosecution equating violations of civil statute section 375a with violations of section 656, the criminal misapplication statute, charged the jury in pertinent part:

> [I]f there are a series of loans made in violation of [section 375(a)'s] $5,000 limitation, you may decide, and *must decide* from the evidence whether or not these loans taken individually or cumulatively constitute a willful disregard for the welfare of the bank and, as such, a misapplication of bank funds, which if accompanied by an intent to injure or defraud, would constitute a criminal violation under section 656.

The *Christo* court held that the instructions constituted error. In reaching its conclusion, the court relied on *United States v. Steinman*, 172 Fed. 913 (3d Cir. 1909), where the Third Circuit held, in a case involving bank overdrafts, that it was reversible error

for the district court to instruct the jury that unlawful acts of maladministration (the overdrafts exceeded civil lending limitations) evidenced an intent which warranted conviction under the misapplication statute. *Christo*, 614 F.2d at 486 (citing *Steinman*, 172 F. at 916).

The *Christo* court felt that the jury charge in that case ran afoul of *Steinman's* prohibition against instructions that unlawful acts of maladministration evidence criminal intent to misapply bank funds under section 656. The pertinent part of the instructions in this case states:

> Now, this next instruction is in the portion that relates to section 656, but it is actually applicable anywhere that it may have occurred in the presentation of evidence on the charges. You have heard reference at various times during the trial to title 12 U.S.C. § 84, the civil lending limit statute. It is a civil statute or regulation which limits the amount that a federally regulated bank may lend to a borrower or related group of borrowers. Therefore, in violations of section 84 a loan should not be considered by you as violations of the criminal law. You may consider, however, evidence of or violations of section 84 as you would any other evidence in determining whether or not the defendants had the required intent to violate the criminal laws charged in this indictment.

The instructions in this case, clear, cogent, and markedly different from those given in *Christo*, do not contravene the *Steinman* prohibition; therefore, they do not constitute reversible error. Given the tenor of the trial and instructions in *Christo*, the jury could

have felt *compelled*, like the jury in *Steinman*, to infer criminal intent to misapply funds based on evidence of civil banking statute violations. The jury could not have felt so compelled in this case. First, the tenor of this trial was different from that in *Christo*. Second, in this case, the district court made it clear that the jury did not have to infer criminal intent to misapply funds because of section 84 infractions. Rather, after stating that infractions of section 84 should not be considered as violations of the criminal law, the court instructed the jury that it could consider this evidence as it would any other evidence in determining whether the defendant had the required intent to misapply funds.

We find no error in the district court's instructions.

PROSECUTOR'S IMPROPER CLOSING ARGUMENT

Stefan and Freedman also contend that their convictions should be reversed because the prosecutor made improper prejudicial remarks during closing argument. During the summation to the jury, co-defendant Greenfield's counsel argued that the grand jury only heard the "prosecution's side of the matter" and speculated about differences in the evidence presented to the grand jury and at trial. In the rebuttal phase of the prosecutor's closing argument, the prosecutor stated:

> There is an accusation, by implication at least, that this case is a fabrication. South Florida is a big area. There is a lot of crime in South Florida. Is it reasonable to think that the government would fabricate a case just to go to trial with all of the crimes in this area?

Appellants' counsel immediately objected and moved for a mistrial. The district court reserved ruling on the matter, but never made a ruling. Neither appellant thereafter asked for a ruling; neither raised the issue again until on appeal.

The government argues that under these circumstances the appellants failed to preserve the objection; therefore, the claim must be judged under the plain error standard of Federal Rule of Criminal Procedure 52(b). Stefan and Freedman argue that the plain error standard is not applicable because their motion was made at the "very end of the trial" and that "there was no later time at which the motion would normally be raised."

We conclude that the district court, by failing to make a ruling, implicitly overruled appellants' objection and denied their motion for a mistrial. Under these circumstances, reversal is warranted if the prosecutor's remarks were (1) improper, and (2) prejudicial to a substantial right. *United States v. Rodriguez*, 765 F.2d 1546, 1559 (11th Cir.1985); *United States v. Bascaro*, 742 F.2d 1335, 1353 (11th Cir.1984).

In this case, the prosecutor's question: "Is it reasonable to think that the government would fabricate a case with all the crime in this area?" was improper. This court, and others, have repeatedly chastised prosecutors for arguing or even suggesting that "the government only prosecutes guilty people." This line of argument is forbidden because it implies that the prosecutor reached the determination that the defendant is guilty before trial and that the jury should weigh

this fact in making its determination. *United States v. Garza,* 608 F.2d 659 (5th Cir.1979).

Notwithstanding our condemnation of the prosecutor's remarks, we do not find that reversal is required. To properly assess the prejudicial quotient of improper remarks, we must review them in context and assess their probable impact on the jury. *Rodriguez* at 1560 (citing *United States v. Young,* ___ U.S. ___, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). We find it significant that the improper remarks occurred during rebuttal. Here, as in *Young,* the prosecutor made improper remarks in response to improper remarks made by opposing counsel. In *Young,* the Supreme Court chastised the prosecutor for expressing his personal opinion as to the defendant's guilt, but concluded that "any potential harm from this remark was mitigated by the jury's understanding that the prosecution was countering defense counsel's repeated attacks on the prosecution's integrity and the defense counsel's argument that the evidence established no crime." *Young,* ___ U.S. at ___, 105 S.Ct. at 1048, 84 L.Ed.2d at 14.

Likewise, in the case before us, the harm inflicted by the prosecutor's improper remarks was lessened by the jury's understanding that the prosecutor's remarks were an invited response. Appellants were not prejudiced by the prosecutor's remarks, therefore, reversal is not required.

RICO CONSPIRACY CHARGE TAINT

Count I of the indictment charged appellants Stefan and Freedman, among others, with a RICO conspiracy. Racketeer Influenced and Corrupt Organizations, 18

U.S.C. §§ 1962. At the close of the evidence, the district court acquitted Stefan on the RICO count. The court removed Stefan's name from the charging portion of the RICO count but did not remove his name from paragraph five of that count because that paragraph detailed the allegedly fraudulent scheme on which other counts were based. Stefan objected to language in the RICO count that the paragraph five acts were "part of the conspiracy" on the grounds that the phrase could cause the jury to believe that he was still a part of the conspiracy. The district court instructed the jury to: "Examine paragraph [5] of Count I to ascertain or determine whether a scheme or artifice to defraud existed, although, as to the defendant, Joseph Stefan, in doing so, the reference should not be in the context of the conspiracy charged in Count I."

Stefan argues that the instructions did not remove the taint and that the "confusion engendered by leaving [his] name in a paragraph of the RICO conspiracy charge, which was alleged to be 'part of the conspiracy', was enhanced in the government's closing argument." The relevant portion of that argument stated:

> As is alleged in the indictment, the manner and means of carrying out the scheme and artifice to defraud, this plan to defraud, if you will, will be the identical matter and means set forth under Count I, paragraph [5]. So that the manner and means of carrying out the scheme and artifice to defraud are similar to the manner and means of carrying out the conspiracy, the ends which perhaps are difficult.

We have noted before that one of the hazards of a RICO conspiracy count is that when the government is unable to sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of trying the defendant with the label of "racketeer" tainted the conviction of an otherwise valid count. *United States v. Kabbaby*, 672 F.2d 857, 862 (11th Cir.1982) (quoting *United States v. Guiliano*, 644 F.2d 85 (2d Cir.1981)). "That claim, of course, need not always or even often prevail. . . ." *Guiliano*, 644 F.2d at 89.

In determining whether such a claim prevails, important factors are: (1) Whether the jury meticulously sifted the evidence; and (2) whether the appellant was prejudiced by a spill over of evidence relating to other counts or defendants. *Kabbaby*, 672 F.2d at 862.

Stefan contends that the jury did not meticulously sift the evidence because the district court granted acquittals on three of the counts on which the jury convicted him. It is not necessary that the court agree with jury verdicts on all counts to determine that the jury carefully weighed the evidence. The fact that the jury acquitted Stefan on seven other counts, however, demonstrates to us that the jury meticulously sifted the evidence.

Neither was Stefan prejudiced by a spillover of evidence relating to other counts or defendants. Stefan's name was removed from the charging portion of the RICO count and the district court's instruction was sufficient to remove the danger that Stefan would be associated with the RICO conspiracy. Therefore, we hold that the RICO charge against Stefan did not taint his convictions.

18 U.S.C. § 1001 CHARGE

Stefan also contends that his false statement conviction on Count XIV must be reversed because the indictment failed to allege that the 18 U.S.C. § 1001 offense was committed "willfully." Title 18 U.S.C. § 1001 punishes anyone within the jurisdiction of any United States agency who "knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or any device, a material fact, or makes any false, fictitious, or fraudulent statements or representations. . . ." Clearly, "willfullness" is an essential element of the offense. *See United States v. Mekjian*, 505 F.2d 1320 (5th Cir.1975).

Count XIV of Stefan's indictment only charged that Stefan "knowingly made a false, fictitious and fraudulent statement . . . in violation of Title 18 U.S.C. § 1001."

It is axiomatic that, to pass constitutional muster, an indictment must contain every element of the offense charged. *United States v. Varkonyi*, 645 F.2d 453 (5th Cir.1981). *See also, Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). The law does not compel that the indictment track the statutory language. *United States v. Chilcote*, 724 F.2d 1498 (11th Cir.1984). "Moreover, when the indictment specifically refers to the statute on which the charge was based, the statutory language may be used to determine whether the defendant received adequate notice." *Chilcote*, 724 F.2d at 1505.

In this case, Count XIV specifically refers to 18 U.S.C. § 1001. Therefore, Stefan cannot claim that he

did not receive adequate notice of the charges against him. Furthermore, the analytical distinction between the mens rea requirement in 18 U.S.C. § 1001 is so slight in this instance, that even if Count XIV failed to refer to the statute, Stefan would not be heard to say that the indictment was insufficient to inform him of the charges against which he had to defend. The language of Count XIV did not track that of 18 U.S.C. § 1001; however, practical, rather than technical considerations govern the validity of an indictment.

RECORD OMISSIONS

Upon conclusion of the trial in this case, Stefan retained new counsel and asked the court reporter to prepare the transcript for appeal. During this preparation, the court reporter discovered that the transcripts of a one hour and forty-five minute bench conference held on February 3, 1983, were missing.

Stefan argues that because these transcripts were lost, he has been foreclosed the opportunity to examine a significant portion of the trial for error; therefore, his conviction should be reversed. The Court Reporter Act requires that a reporter "record verbatim by shorthand or by mechanical means . . . (1) all proceedings in criminal cases had in open court. . . ." Court Reporter Act, 28 U.S.C. § 753(b) (1970). A criminal defendant has a right to a record on appeal which includes a complete transcript of the proceedings at trial. *Hardy v. United States,* 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964); *United States v. Selva,* 559 F.2d 1303 (5th Cir. 1977). Some disagreement exists, however, as to how much of the record may be omitted before reversal is mandated under the Act.

Stefan relies on *United States v. Selva* which held: (1) Where the defendant is represented by the same attorney at trial and on appeal, reversal is called for only if the defendant can show that failure to record and preserve the specific portion of the trial proceedings visits a hardship on him and prejudices his appeal; but (2) where the defendant is represented by new counsel on appeal, all that need be shown is a significant and substantial omission in the transcript. *Selva*, 559 F.2d at 1303, 1305.

Much disagreement exists regarding the propriety of allowing the issue of whether omissions are significant enough to require reversal under the Court Reporter Act to turn on whether the appellant has a new lawyer or not. We need not enter that debate; even if we adopted the *Selva* standard, Stefan would not prevail on his contention. Although Stefan has a new lawyer on appeal, in the absence of special circumstances, in this very long and complex case, we deem the absence of transcripts from a one hour and forty-five minute bench conference not a "substantial and significant omission."

Notwithstanding the court reporter's guess that the conference was a "pivotal point in the case," the likelihood that Stefan was prejudiced in any way by the loss of one hour and forty-five minutes of transcripts of what the jury did not hear is small. New trials have been ordered pursuant to the Court Reporter's Act where the record lacked voir dire, opening statements, voir dire at closing statements, the government's closing argument, or the entire trial. *United States v. Selva*, 559 F.2d 1303 (5th Cir.1977); *United States v. Gregory*, 472 F.2d 484 (5th Cir. 1973); *United States v. Garcia Bonifascio*, 443 F.2d 914 (5th Cir.1971); *Stephens v. United*

States, 289 F.2d 308 (5th Cir.1961). The omission in this case is clearly less significant than the omissions cited, therefore, we hold that reversal is not required.

RICO COUNT VAGUENESS

Freedman contends that the RICO conspiracy charge against him was impermissibly vague in that the enterprise charge was identified only as "a group of individuals associated in fact," without specifying the members thereof.

The grand jury charged Freedman with conspiring to violate 18 U.S.C. § 1962(c) which prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirect, in the conduct of such enterprises [sic] affairs through a pattern of racketeering activity or collection of unlawful debt." Title 18 U.S.C. § 1961(4) defines "enterprise" as "any individual, partnership, corporation, association or other legal entity and any union or group of individuals associated in fact although not a legal entity." After alleging a conspiracy to violate 18 U.S.C. § 1962(c), Count I of the indictment stated: "It was a part of the conspiracy that the defendants Irvin Freedman, Leo Greenfield, Joseph Stefan, Truman Skinner, John J. O'Connor, and Sandy C. Brous, would be employed by and associated with an enterprise, to wit a group of individuals associated in fact, which enterprise was engaged in and the activities of which affected, interstate commerce."

An indictment will be held sufficient if it (1) contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and (2) enables the accused to plead an acquittal or conviction in bar of future prosecutions for the same offense. *United States v. Bailey*, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575, 593 (1980); *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). The indictment in this case is adequate under this standard. It is clear that the alleged enterprise in Count I consisted of Irvin Freedman, Leo Greenfield, Joseph Stefan, Truman Skinner, John J. O'Connor, and Sandy Brous. Therefore, we hold that Count I was not impermissibly vague and affirm Freedman's conviction on that count.

Conclusion

For the foregoing reasons, we conclude that the appellants' convictions should be affirmed in all respects.

AFFIRMED.

[FILED AUG 11 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5590

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH STEFAN,
IRVIN FREEDMAN

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion MARCH 20, 11 Cir., 1986, ____ F.2d ____).

Before HATCHETT and CLARK, CIRCUIT JUDGES, ALLGOOD*, SENIOR DISTRICT JUDGE

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal

Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOSEPH W. HATCHETT

United States Circuit Judge